Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JAMES STEEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether or not this case should be remanded for further findings because the trial court erred when it refused to order the Assistant United States Attorney to turn over his contemporaneous notes of statements made by petitioner Steel during the pretrial proffer session.

II. Whether or not petitioner's conviction in this case should be vacated because the Court failed to conduct the appropriate Rule 403 balancing test to determine whether the admissibility of testimony that the handgun in petitioner's possession at the time of this arrest smelled of gunpowder evidencing that it had recently been fired, should have been excluded pursuant to Rule 403 as being unduly prejudicial.

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CITATION TO DECISIONS BELOW

None of the opinions issued in this matter are reported. On November 19, 2001 the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court in the District of New Jersey entered on April 4, 2001. Petitioner did not request a panel rehearing nor a rehearing *en banc*.

STATEMENT OF JURISDICTION

On November 19, 2001 the United States Court of Appeals for the Third Circuit affirmed Petitioner's sentence in the United States District Court of the District of New Jersey. Petitioner did not request a panel rehearing or a rehearing *en banc*. This petition, a criminal matter, is filed within ninety (90) days of that judgement in compliance with Supreme Court Rule 13(1).

The jurisdiction to review the November 19, 2001 judgment is conferred on this Court by 20 U.S.C. Section 1254(1).

RELATED WRITS

The Writ of Petitioner James Steel is unrelated to any other writ currently pending before this Court.

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision involved is the Fifth Amendment to the United States Constitution which provides in pertinent part:

> "[No person shall] be deprived of life liberty, or property, without due process of law;"

STATEMENT OF THE CASE

On August 31, 2001 petitioner James Steel was indicted in a one count Indictment No. 00-575 in which he was charged with having been convicted of a crime punishable by imprisonment for a term exceeding one year in a Court in the State of New Jersey, did knowingly possess in and affecting commerce a firearm in violation of Title 18 U.S.C. Sections 922(g)(1) and (2).

On December 5 and December 6, 2000 trial took place resulting in petitioner being found guilty on Count One of the Indictment in violation of Title U.S.C. Sections 922(g)(1) and (2).

On April 2, 2001 petitioner James Steel was sentenced by The Honorable Garrett E. Brown, U.S.D.J. to a period of 108 months incarceration. The Court determined at the time of sentencing that petitioner's Total Offense Level was 24 and he was in Criminal History Category 6.

Prior to the commencement of trial, pretrial hearings were conducted on November 20, 2000. At that time defense counsel raised the issue that at some time between indictment and the trial, appellant James Steel participated in a proffer session in the presence of the

Assistant United States Attorney and a Special Agent from the ATF. At that time there was no formal statement, transcript or recording of statements made by appellant. However, defense counsel asked that any notes produced memorializing statements made by Mr. Steel, be turned over to counsel pursuant to Rule 16 of the Federal Rules of Criminal Procedure in that they were statements made by appellant to law enforcement agents at a time that he knew they were law enforcement agents.

The Assistant United States Attorney clearly informed the Court that if appellant Steel testified at the time of trial to any statements made contrary to what he said in the proffer session, those statements would be used to impeach his credibility. The Assistant United States Attorney also informed the Court that the only notes taken during the meeting were those taken by the Assistant United States Attorney himself. He claimed that these notes were "work product" and should not be disclosed to defense counsel. Neither the ATF Agent nor the Federal Public Defender who represented Mr. Steel at the time of the proffer took any other notes of the statements made by Mr. Steel. Therefore, no notes memorializing the statements of Mr. Steel were turned over to defense counsel. In addition to the notes not being turned over to defense counsel, the Court made no *in camera* review of the notes. The Court did not require any substantiation by the Assistant United States Attorney that the notes were indeed work product, legal strategy, or other impressions of the statements made by Mr. Steel. They were simply notes of statements made by Mr. Steel.

At trial, testimony revealed that in the early morning hours of May 7, 2000 New Brunswick New Jersey Technical Services Detective John Langan was patrolling the area of Remsen Avenue and Baldwin Street in the City of New Brunswick in an unmarked police car. As Officer Langan was approaching that intersection a woman standing on the street motioned him to the corner. As he approached the corner he saw a group of approximately twelve to fifteen people gathered in a tight circle. Officer Langan identified petitioner, James Steel, as one of the individuals who was in the group, but was standing two or three steps back from the group. Mr. Steel was not wearing a shirt and was facing the police officers. They did not recognize him. While he was standing there, the officer testified that he saw Mr. Steel's right hand motion to the center of his waistband, taking hold of a small silver metal object. He saw petitioner Steel making this motion as he turned and started walking away from the officers. The police officer believed that petitioner Steel was in possession of a weapon and began following him. As Mr. Steel was walking away he dropped his right hand down beside him and glanced over his shoulder several times looking back at the officer as he increased his pace in a direction away from the officer. Shortly thereafter Mr. Steel broke into a full run, at which time the police officers pursued him. Officer Langan testified that as Mr. Steel was running he could clearly see in his right hand "every time he ran, the barrel of a handgun coming up and down as he is running away." As Officer Langan began to close in on Mr. Steel, he testified that he saw Mr. Steel throw down his right hand with the gun in it. He testified that he could see it and both hear it as the metal

hit the pavement. Mr. Steel was apprehended shortly thereafter when Officer Langan caught up to him and tackled him to the ground. Immediately after apprehending Mr. Steel, Office Langan testified that he ran back to the area he believed the gun was thrown and recovered a handgun on the sidewalk.

Following the arrest of Mr. Steel there were no forensics completed on the gun, including fingerprinting or any other scientific tests. Upon returning to Headquarters Office Langan examined the handgun and found four live rounds and three spent shell casings in the weapon. At that time Officer Langan also testified that the handgun "had an odor of burnt gunpowder. Almost that it had been recently fired."

The issue of whether or not the Government could have elicited such testimony concerning the cartridges and the odor of burnt gunpowder evidencing that the weapon had recently been fired was the subject of a pretrial ruling by the Court. In a pretrial argument the Government revealed that it intended to admit evidence concerning the condition of the firearm at the time that it was recovered in that it contained four loaded rounds, three spent shell casings, and that it smelled of gunpowder. The Government's position was that the condition of the firearm is "inextricably linked to the facts of the case and the recovery of the firearm." Defense counsel objected to this testimony arguing that it was both not relevant and that the prejudicial effect of the testimony would far outweigh any beneficial value. The Court overruled the objection without doing any Rule 403 balance

test, but merely concluding that the objection was overruled, stating the "it certainly goes to questions of knowledge and intent in possessing the firearm."

Following trial, petitioner was found guilty of the one Count Indictment which charged that after having been convicted of a crime punishable by imprisonment for a term exceeding one year in the State of New Jersey, he did knowingly possess a loaded handgun that traveled interstate commerce in violation of Title 18 U.S.C. Section 922(g)(1).

Following petitioner's conviction on April 2, 2001 the Court found that pursuant to the application of Section 2K2.1 and Section 2K2.I(a)(2) of the Sentencing Guidelines stating that if the defendant has two prior convictions for a crime of violence or controlled substance offense, Base Offense Level 24 was applicable. There were no enhancements or downward adjustments applied and as a result, petitioner was sentenced to a period of 108 months incarceration and a fine of $4,000.00.

A Notice of Appeal was timely filed in this case on April 2, 2001 and on November 19, 2001 the Third Circuit issued an unpublished memorandum opinion in which the Court rejected Steel's claim that the Assistant United States Attorney's notes of the proffer session were not discoverable and that the District Court did not abuse its discretion when it admitted testimony that the gun smelled like it had recently been fired.

ARGUMENT FOR THE ALLOWANCE OF THE WRIT

I. THIS CASE SHOULD BE REMANDED BECAUSE THE TRIAL COURT ERRED WHEN IT REFUSED TO ORDER THE ASSISTANT UNITED STATES ATTORNEY TO TURN OVER HIS CONTEMPORANEOUS NOTES OF STATEMENTS MADE BY APPELLANT STEEL DURING THE PRETRIAL PROFFER SESSION. THIS CASE MUST BE REMANDED FOR FURTHER FINDINGS.

In a pretrial hearing it was revealed that petitioner Steel participated in a proffer session with his prior counsel, the Assistant United States Attorney and a Special Agent of the ATF. During this proffer session petitioner Steel made several statements to the Assistant United States Attorney and the ATF Agent concerning his involvement in the offense charged in this indictment. Trial counsel for petitioner Steel requested that the trial court order the production of all notes or recordings of petitioner Steel's statements made during that proffer session. The Assistant United States Attorney represented that the only notes taken during the course of that proffer session were taken by himself and that he would not produce them because they were "attorney work product." The Court refused to order the production of the Assistant United States Attorney's notes memorializing the statements made by petitioner Steel. The Court did not even review the notes to determine the legitimacy of the Assistant United States Attorney's claim that they were work product.

Rule 16 of the Federal Rules of Criminal Procedure clearly requires the production of any written or recorded

statement made by the defendant that is within the possession, custody, or control of the Government. More specifically, Rule 16 (a)(1)(A) states that the Government has an obligation to disclose to the defendant:

> That portion of any written record containing the substance of any relevant oral statement made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a Government agent. . . .

Clearly, a statement of the defendant need not be actually written or typed by the defendant to be his "written statement." A stenographic transcript or even a Government interviewer's relatively contemporaneous writings may be considered written statements of a defendant. In determining whether the notes of another or the statements of another constitute the "written or recorded statement" of a defendant, is revealed by analyzing the nexus between the recorded or written statement and the actual statement of the defendant. *United States v. Walk*, 533 F.2d 417, 418 (9th Cir. 1975).

In *Walk* the Ninth Circuit Court of Appeals determined that written notes taken by an FBI Agent of an interview with a witness who's statements contained quotes of previous statements made by the defendant, were not discoverable pursuant to the Jencks Act, 18 U.S.C. Section 3500 because the notes were "too attenuated" to be considered written statements made by the defendant within the meaning of Rule 16(a)(1)(A). There the Court was analyzing statements made by a third party quoting the defendant and found that they were not discoverable pursuant to Rule 16. However, in *Walk*,

Rule 16 was not the only means for the defendant to obtain this information, and thereby ensure a fair trial. In *Walk*, the defendant would at least obtain the statements made by the witness, including attributions to the defendant, after the witness testified pursuant to the Jencks Act, 18 U.S.C. Section 3500. I suggest to the Court that in this case Rule 16 is the only vehicle for the production of the notes of a defendant's statement. If they are not produced pursuant to Rule 16, they will only be produced after it is too late to assist the defendant. The Jencks Act, 18 U.S.C. Section 3500, does not apply to the statement of a defendant unless the witness who recorded them testifies. In the present case the claim by the Assistant United States Attorney that he took the notes will effectively ensure that they will never be produced.

Rule 16(a)(1) deals merely with a defendant's statements. It contains no further requirement. Clearly, it is intended, by a clear reading of the rule, to include a defendant's statements made to any other third person which are recorded in any reasonable form and find their way into the hands of the Government. Rule 16(a)(1) does not contemplate the discretionary pretrial discovery of only formal written statements or confessions. It is well established that any recordings of a defendant's statement, no matter how informal or casual, are discoverable pursuant to this rule. *United States v. Lewis*, 511 F.2d 798, 802-803 (D.C. Court of Appeals 1975). In addition, a reading of the rule neither requires that the defendant ratified, approved, or otherwise adopted any recording of his statements, nor that he even be aware that such statements are recorded. Indeed, statements of the defendant recorded "solely even in the notes or memories of

investigators or prosecutors" are discoverable pursuant to Rule 16(a)(1). *Lewis, supra,* at 802.

In the present case, during the course of argument concerning the production of the Assistant United States Attorney's notes of the statements made by appellant during the proffer session, the Assistant United States Attorney refused to produce the notes by claiming they are his "work product." The Assistant United States Attorney uttered these words as if he were asserting some magical shield that forbade the Court from ordering the production of these documents based solely on his claim that they were "work product." At no time did the Assistant United States Attorney even attempt to place on the record any justification as to why indeed these notes of the petitioner's statements were work product. He never claimed that they contained trial strategy, legal impressions, or other protected mental product of the Assistant United States Attorney. Rather, he merely asserted that he would not produce them because they were "work product" and the Court, unfortunately, agreed. The Court, after inquiring whether someone else took notes, and was informed that the only notes were taken by the Assistant United States Attorney, ordered the Government to produce only the notes taken by others, excluding the only notes that existed, those of the Assistant United States Attorney.

I suggest to the Court that it was error for the trial court to dismiss the request for production of the Assistant United States Attorney's notes based on this bold assertion by the Government. Indeed, even if these notes were work product, the discovery rules cannot be applied

in such a manner that derogates or diminishes the constitutional rights of a defendant in a criminal case. For example, even work product may not automatically be exempted from disclosure if otherwise required by *Campbell v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). *Mincey v. Head*, 206 F.3d 1106 (11th Cir. 2000).

In *Goldberg v. United States*, 425 U.S. 94, 96 S.Ct. 1338 (1976) the United States Supreme Court considered the issue of whether or not interview notes taken by a Government lawyer are non-producible merely because the notes were taken by the attorney. The Government argued that simply because a Government lawyer interviewed a witness and took notes memorializing the statements of the witness, his notes were not producible pursuant to the Jencks Act, 18 U.S.C. Section 3500. In spite of a request for these notes by defense counsel, the trial judge not only denied his motion on the ground that the material was "work product" of the Assistant United States Attorney, the Court also declined to even inspect the material *in camera*.

While *Goldberg* is a case that does not involve Rule 16, but rather the Jencks Act, 18 U.S.C. Section 3500, I suggest to this Court that the reasoning of the Supreme Court is equally applicable here. In *Goldberg* the Supreme Court found that there was "nothing in the Jencks Act, or its legislative history, that accepts from production otherwise producible statements on the ground that they constitute 'work product' of Government lawyers." *Goldberg, supra*, at 1343-44. The Supreme Court further held that the trial court was obligated to conduct some inquiry into the circumstances of the witnesses' interview that was in question. Clearly, the Supreme Court held that the trial

court should have conducted a more in depth inquiry, including an *in camera* review of the notes to determine whether or not they should have been disclosed to defense counsel. *Goldberg, supra,* at 1347 (Citing *Campbell v. United States,* 365 U.S. 85, 81 S.Ct. 421 (1961)). As a result, the Supreme Court in *Goldberg* ordered that the case be remanded to the trial court with specific directions to hold an inquiry to determine whether or not the notes of the Assistant United States Attorney should have been turned over to defense counsel. *Goldberg, supra,* at 1348.

I suggest to the Court that disclosure of the notes memorializing statements made by appellant during the proffer session were essential to assist trial counsel in the adequate preparation of his trial strategy. Without knowing what the Assistant United States Attorney recorded or memorialized concerning statements made by petitioner Steel, trial counsel was in an impossible position to evaluate any possible defenses that were relevant to Mr. Steel at the time of trial. I suggest that this adverse impact upon the ability of a defendant to prepare is most damaging to his right to due process and a fair trial and requires that the trial court carefully review whether or not the notes of the Assistant United States Attorney should have been shielded as a result of his claim of "work product." See *United States v. Flecha,* 442 F.Supp. 1044, 1046 (EDPA 1977); see also *United States v. Lewis,* 511 F.2d 798 (D.C. Cir. 1975).

The Third Circuit affirmed petitioner's conviction holding that the notes of the Assistant United States Attorney were not discoverable pursuant to Rule 16. The Court found that the proffer session did not constitute

"interrogation," citing *United States v. Litman*, 547 F.Supp. 645, 561 (W.D.Pa. 1982).

This petition should be granted to clarify this issue.

II. THIS CASE SHOULD BE VACATED BECAUSE THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED TESTIMONY THAT THE SEIZED WEAPON CONTAINED SPENT CARTRIDGES AND SMELLED OF BURNT GUNPOWDER EVIDENCING THAT IT HAD BEEN RECENTLY FIRED.

Rule 403 of the Federal Rules of Evidence specifically provides that the trial court may exclude otherwise relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . . "

In addition, Rule 401 of the Federal Rules of Evidence basically states that in order for evidence to be admissible, it must be relevant, in that, the evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Indeed, relevant evidence will be admissible unless the Rules of Evidence provide to the contrary. *United States v. Scarfo*, 850 F.2d 1015, 1019 (3rd Cir. 1988). (Citing *Huddelston v. United States*, 485 U.S. 681, 687, 108 S.Ct. 1496, 1500 (1988).

In the present case petitioner Steel was charged with possession of a handgun and ammunition that was transported in interstate commerce by a convicted felon. At the time of trial petitioner Steel stipulated to the fact that

the weapon recovered was a handgun and that the four rounds of ammunition were in fact ammunition within the definition of Title 18 U.S.C. Section 922. Petitioner also stipulated that the weapon traveled in interstate commerce, although there was no such stipulation, nor was there any evidence concerning the four live rounds of ammunition or the spent cartridges.

At the time of trial, testimony was elicited from Officer Langan that in addition to the four live rounds of ammunition there were two spent cartridges in the handgun and that the handgun had the odor of burnt gunpowder evidencing the fact that it had recently been fired. The existence of the two spent cartridges as well as the testimony that the handgun smelled of gunpowder evidencing the fact that it had been recently fired, was of absolutely no relevance to any of the charges contained in the indictment.

The issue of the admissibility of the testimony concerning the two spent cartridges as well as the smell of burnt gunpowder was the subject of a pretrial hearing by the trial Court. At that time, defense counsel clearly objected on the basis that the probative value of this testimony was substantially outweighed by the undue prejudicial effect and that it should be excluded. While counsel did not cite Rule 403 or 401, it is clear that he intended to invoke these rules of evidence. This invocation required the Court to conduct the appropriate 403 balancing test, which it failed to do. The importance of the trial court conducting the balancing test required by Rule 403 is often discussed in reference to a decision concerning evidence offered pursuant to Rule 404(b) of the Federal Rules of Evidence. In such a situation it is

often determined that the proffered testimony is so explosive, that the Court must conduct a balancing test when Rule 403 is invoked by the defense. Indeed, it is well recognized that relevant other crimes evidenced may be excluded if the probative value of the evidence is substantially outweighed by the danger of undue prejudice. *Scarfo, supra,* 850 F.2d at 1019. In applying the 403 balance test, the Court must assess the genuine need for the challenged evidence and balance that necessity against the risk that the information will influence the jury to convict the defendant on improper grounds. See *United States v. Cook,* 538 F.2d 1000, 1003 (3rd Cir. 1976); *United States v. Driggs,* 823 F.2d 52, 54 n.2 (3rd Cir. 1987). This Circuit has long recognized that there is indeed a significant danger of the existence of undue prejudice where the proffered evidence presents substantial possibilities that a jury will harbor strong adverse sensitivity to the challenged evidence. In order to overcome the significant risk of unfair prejudice, the Government must provide the necessity of the proffered evidence. *Cook, supra,* 538 F.2d at 1004.

The Advisory Committee Note to Rule 403 states that "unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Hence, any evidence that may suggest the guilt of the defendant could be described as prejudicial, but would not necessarily require a Rule 403 balancing test. However, when Rule 403 is invoked, requiring the Court to conduct the balancing test, the focus must be on the unfairness of the proffered evidence in the sense that the proponent would secure an advantage that results from the likelihood the

evidence would persuade the jury by "illegitimate means." *United States v. Blyden*, 964 F.2d 1375, 1378 (3rd Cir. 1992); *United States v. Scarfo*, 850 F.2d 1015, 1019 (3rd Cir. 1988); *United States v. Driggs*, 823 F.2d 52, 54 n.2 (3rd Cir. 1987).

As a general rule, this Circuit exercises great restraint when reviewing the trial Court's handling of a Rule 403 evaluation at the time of trial. However, it is also equally established that where the opponent of the proffered evidence invokes Rule 403, the trial judge has an obligation to conduct the requisite balancing test to determine the probative value of the proffered evidence versus the possibility of undue prejudice and record that balancing analysis, which would be the basis of the exercise of his sound discretion so that it may be fairly reviewed on appeal. *Government of the Virgin Islands v. Archibald*, 987 F.2d 180, 186 (3rd Cir. 1993). However, where the trial court fails to perform the balancing test and the record is devoid of any explanation for the basis of denying a Rule 403 objection, this Court may undertake an evaluation of the record and conduct the balancing test, without the need of difference to the reasoning of the trial Court. *Archibald, supra*, 987 F.2d at 186; *Government of the Virgin Islands v. Pinney*, 967 F.2d 912, 918 (3rd Cir. 1992); *United States v. Schwartz*, 790 F.2d 1059, 1062 (3rd Cir. 1986). Furthermore, if after a thorough analysis, this Court determines that the trial court abused its discretion in admitting the disputed evidence, and this Court cannot say that it is "highly probable that the evidence did not contribute to the jury's judgment of conviction," the error cannot be regarded as harmless and the matter must be remanded for a new trial. *United States v. Schwartz*, 790

F.2d 1059, 1062 (3rd Cir. 1986); See also, *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 284 (3rd Cir. 1976).

In the present case I suggest to the Court that the findings and the conduct of the trial court were both deficient. First of all, it is abundantly clear that the trial court did not, in any way, conduct the balancing test required by Rule 403, although Rule 403 was clearly raised by defense counsel. The Court did not ask the Assistant United States Attorney for a proffer as to the relevance of the testimony, nor did he in any way consider the undue prejudice that would result. The Court merely ruled that it was admissible and moved on to other considerations. In addition, the trial Court not only failed to conduct the appropriate balancing test, but if it had, sound discretion would clearly have dictated that the evidence should have been excluded.

Petitioner Steel is charged with the possession of a handgun and the ammunition, having been a disqualified individual. The Government, while it sought a stipulation concerning the interstate nature of the handgun, never sought such a stipulation concerning the ammunition and offered no testimony whatsoever. Therefore, the ammunition was not in any way significant to the Government's prosecution. It is clear that the theory of the prosecution was to merely convict petitioner on the possession of the handgun, which petitioner stipulated traveled in interstate commerce as required by Title 18 U.S.C. Section 922. Why then was the testimony concerning the live ammunition even relevant let alone the testimony concerning the spent cartridges and the smell of burnt gunpowder evidencing that the gun had recently been fired? I suggest to the Court that when the appropriate Rule 403 balance test

is done it is clear that the relevant value of the testing is near zero, while on the other hand the potential for undue prejudice is substantial.

By admission of this testimony the jury is not only told that petitioner, who has a prior conviction, is in possession of a handgun, but they are told that he is in possession of a handgun with two spent cartridges and the smell of gunpowder evidencing that it had been recently fired. I suggest that this is a terrifying consequence for the jury in that the Government was implying that not only did he possess this weapon, but he in fact used it, and used it very recently. This testimony portrayed petitioner as an extremely dangerous individual in a manner that made it absolutely impossible for the jury to rationally and reasonably judge the testimony of the case concerning his mere possession of the handgun. As a result of the admissibility of this testimony, the Government was permitted to alter the entire focus of the case from being a case involving the mere possession of a handgun by a disqualified individual to a case that required action by the jury to secure the safety of the general public. The obvious impression was that appellant was running around the streets of New Brunswick firing this handgun, causing substantial risk to life and limb of all those in his path. While the Government never articulated such an argument, it really was not necessary after they told the jury that he was in possession of spent cartridges and a handgun that had the smell of recently fired gunpowder.

The Third Circuit rejected petitioner's argument holding that the trial court did not abuse its discretion in admitting this testimony.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the request for Writ of Certiorari be issued.

Respectfully submitted,

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Date: February 15, 2002

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1953

UNITED STATES OF AMERICA

v.

JAMES A. STEEL, JR.

James Steel,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 00-cr-00575)
District Judge: Honorable Garrett E. Brown, Jr.

Submitted Under Third Circuit LAR 34.1(a)
October 30, 2001

Before: SLOVITER, NYGAARD and AMBRO,
Circuit Judges

(Filed November 19, 2001)

MEMORANDUM OPINION

AMBRO, Circuit Judge

Early in the morning on May 2, 2000, two plain-clothes officers of the New Jersey Police Department observed Appellant James Steel standing outside a bar in New Brunswick. Steel was not wearing a shirt. He stood a few feet away from a group of around fifteen people. The officers believed the group had formed to watch a fight. One of the officers observed a shiny metal object, which he suspected was a gun, in Steel's waistband. Steel began walking away, and the officers followed him on foot. Steel increased his pace, repeatedly glancing over his shoulder and eventually breaking into a sprint. As the officers pursued him, Steel threw a gun onto the sidewalk and kept running. The officers caught Steel, placed him under arrest, and recovered the gun, which remained on the sidewalk where Steel discarded it.

A jury convicted Steel of violating 18 U.S.C. § 922(g)(1), which prohibits felons from possessing a firearm that has traveled in interstate commerce. Steel's appeal of his conviction raises two issues. First, he argues that the District Court should have ordered the Government to turn over its notes of statements that he made during a pretrial proffer session. Second, he contends that the Court violated Federal Rules of Evidence 401 and 403 by admitting evidence that the gun contained four live rounds and three spent shall casings, and smelled of burnt gunpowder. We reject both arguments and thus affirm.

I.

Before trial, Steel participated in a proffer session with his counsel at the time and the Assistant U.S. Attorney ("AUSA") and investigators working on his case. During the proffer session, Steel made several statements concerning his possession of the gun. The AUSA took notes of Steel's statements. Between the proffer session and his trial, Steel obtained new counsel. Steel's trial counsel asked the District Court to order the Government to produce the AUSA's notes of Steel's statements. The Government argued that the notes were attorney work product and thus exempt from discovery, and the District Court agreed. We review the District Court's ruling for abuse of discretion. *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000); *United States v. Adams*, 759 F.2d 1099, 1111 (3d Cir. 1985).

Federal Rule of Criminal Procedure 16(a)(2) exempts from discovery "reports, memoranda, or other internal government documents made by the attorney for the government." Fed. R. Crim. P. 16(a)(2). The AUSA's notes are, if not "memoranda," at least "internal government documents," and thus appear to fall within subsection (a)(2)'s ambit. Steel argues, however, that the Government was obligated to turn over the AUSA's notes under subsection (a)(1)(A), which requires production of "that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest *in response to interrogation* by any person then known to the defendant to be a government agent," and subsection (a)(2), which provides that the discovery exemption for prosecutors' work

product does not apply to such materials. Fed. R. Crim. P. 16(a)(1)(A), (a)(2) (emphasis added).

Contrary to Steel's argument, subsection (a)(1)(A) does not apply because his statements during the proffer session were not made "in response to interrogation." Steel's counsel and the Government agreed on the terms of the proffer session before it took place. Steel chose to attend the proffer session and to talk with the Government about the events surrounding his arrest. Steel's counsel at the time was present when he made the statements in question. Under these circumstances, the questions that Steel was asked during the proffer session did not constitute "interrogation." *Cf. United States v. Litman*, 547 F. Supp. 645, 651 (W.D. Pa. 1982) (holding that where a defendant requests a meeting with the Government, an AUSA's notes of the defendant's statements at the meeting are exempt from discovery under Rule 16). Therefore, subsection (a)(1)(A) does not apply and the AUSA's notes of Steel's statements are protected work product under subsection (a)(2). *Cf. United States v. Scott*, 223 F.3d 208, 212 (3d Cir. 2000) (holding that Rule 16 does not require the Government to disclose a defendant's spontaneous statements because those statements are not made in response to interrogation). Consequently, the District Court did not abuse its discretion when it refused to order the Government to disclose the AUSA's notes.

II.

At a pretrial hearing, the Government said that it planned to introduce evidence that when the officers recovered the gun, it contained four live rounds and three

spent shell casings, and smelled of burnt gunpowder. Steel objected that admitting this evidence would violate Federal Rules of Evidence 401 and 403. The District Court overruled Steel's objections, and the Government introduced the evidence at his trial.

A.

Rule 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Irrelevant evidence is inadmissible. Fed. R. Evid. 402. We review the District Court's ruling on Steel's Rule 401 objection for abuse of discretion. *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 110 (3d Cir. 1999).

The District Court did not abuse its discretion. Possession was the only element of the § 922(g) offense that Steel contested at trial. The evidence regarding the gun made it more probable that Steel possessed the same gun that the officers recovered. That the gun contained three spent shell casings and smelled of burnt gunpowder suggested that it had recently been fired. This, in turn, indicated that the gun was abandoned very shortly before the officers picked it up, which corroborated the officers' testimony that Steel had possessed the gun and rebutted Steel's claim that someone else left it behind.

B.

Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. We review the District Court's balancing of probative value against unfair prejudice pursuant to Rule 403 for abuse of discretion. *United States v. Universal Rehabilitation Services (PA), Inc.*, 205 F.3d 657, 665 (3d Cir. 2000). In so doing, we give "great deference" to the District Court's ruling and may reverse only if it was " 'arbitrary or irrational.' " *Id.* (quoting *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 453 (3d Cir. 1997)).

The District Court's weighing of the evidence was not arbitrary or irrational. As explained above, the evidence has significant probative value because it showed that Steel possessed the gun, and possession was the only element of the offense that Steel contested. The danger of unfair prejudice, on the other hand, was slight. Firing a gun is not illegal per se; hence the evidence did not suggest that the gun was used in a separate, uncharged offense. Even if the jury might have surmised that the gun was fired illegally, that risk did not substantially outweigh the evidence's value in establishing that Steel possessed the gun.

* * *

We hold that the AUSA's notes of Steel's statements made during the proffer session are protected work product and exempt from discovery under Rule 16 because those statements were not made "in response to interrogation." Further, we hold that the District Court did not

abuse its discretion when it found that evidence indicating that the gun was recently fired was admissible under Federal Rules of Evidence 401 and 403. Thus, the judgment of the District Court is affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

/s/ Thomas L. Ambro
Circuit Judge

DATED: November 19, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1953

UNITED STATES OF AMERICA

v.

JAMES A. STEEL, JR.

James Steel,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 00-cr-00575)
District Judge: Honorable Garrett E. Brown, Jr.

Submitted Under Third Circuit LAR 34.1(a)
October 30, 2001

Before: SLOVITER, NYGAARD and AMBRO,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted on October 30, 2001.

On consideration whereof, it is now ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered April 10, 2001, be and the same is hereby AFFIRMED. All of the above [sic] in accordance with the opinion of this Court.

ATTEST:

/s/ [Illegible]
Clerk

DATED: November 19, 2001